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NO. 95-223

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY,

Petitioner,

V.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Cincinnati waived its due process challenges to the jury's actual and punitive damage awards because it failed to present the issues to the courts of South Carolina in a timely and proper manner.

II. Whether a due process issue is presented by Cincinnati's contention that post-trial review of a punitive damage award is meaningful only if conducted by an appellate court rather than a trial court.

III. Whether petitioner's due process challenges to the actual and punitive damage awards collapse when the theory of liability submitted to the jury is properly construed.

IV. Whether any federal constitutional issue is presented by Cincinnati's litany of complaints about South Carolina procedural and evidentiary law or challenges to the sufficiency of the evidence to support the verdict.

PARTIES TO PROCEEDINGS

Pursuant to Rule 29.1 of the Rules of this Court, respondent states that it is a closely-held corporation with no parent or subsidiary.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Orangeburg Sausage Company, respectfully requests that the Court deny the Petition for a Writ of Certiorari of Petitioner, Cincinnati Insurance Company.

STATEMENT OF THE CASE

This case arises out of Cincinnati Insurance Company's negligence and its bad-faith failure to pay an insurance claim. Orangeburg Sausage Company (Osco) engages in the manufacture of sausage and the storage, transportation and sale of packaged food stuffs, primarily to schools. In 1989, Hurricane Hugo damaged Osco's buildings, and water which was blown into Osco's freezer building damaged the packaged food stuffs stored there. The total damage to Osco's property, real and personal, amounted to $254,029.23. Osco believed it was insured for this loss under a policy issued by Cincinnati Insurance Company (Cincinnati) and sold to Osco by Cincinnati's agent, Bryant.

Osco had obtained a five-year policy from Cincinnati in 1983. R. 359, 991. In 1986 Osco asked Bryant to increase the insurance coverage on its personal and other property. Cincinnati issued a policy with the requested,

higher limits. R. 1065. In 1988, Osco renewed the policy for one year, with no request for changes in coverage. R. 358, 1068. After Osco suffered substantial damage from Hurricane Hugo, it filed a claim for the freezer contents. Cincinnati denied payment under the policy because the 1988 policy listed an incorrect and non-existent address as well as Osco's correct address.[1] R. 332.

Cincinnati insisted that Osco's food stuffs were stored at the non-existent 488 High Street address, and therefore Osco was entitled only to $30,000 in coverage for the personal property stored in its freezer building. R. 328-331. At the time Cincinnati refused to pay, one of its

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[1] Osco's address is, and always has been, 597 High Street, Orangeburg, South Carolina. When Osco renewed its policy in 1988, Bryant, in an application signed by him but not by Osco, allocated $230,000 in personal property coverage to 597 High Street, and for an unexplained reason, allocated $30,000 in personal property coverage to an address he called 488 High Street. R. 332-333. There is not, and never has been, any such address. Osco never saw the application. R. 298-299, 366.

adjusters had made a written determination that the loss of the freezer contents was covered and had increased Cincinnati's reserves to cover it. R. 319-322. Also, Cincinnati refused for more than eight months to pay the undisputed claim for Osco's real property damage. When Cincinnati finally offered payment on the undisputed elements of damage, it demanded in exchange a concession that there was such an address as 488 High Street. R. 326-329.

Eventually, Osco sued Cincinnati for reformation of contract, breach of contract, bad faith refusal to pay and negligence, and sued Bryant for negligence. The trial was bifurcated. Liability and actual damages were tried first, followed by a trial of the punitive damages issue.

As a result of Cincinnati's refusal to pay its claims, Osco had been unable to replace its inventory. When its customers called for service, Osco was unable to provide them with packaged foods, and over a period of time lost

a number of customers. R. 451. An economist testified that the total actual damages suffered by Osco were $595,216 up to the time of trial. Osco's present and principal shareholder testified that he believed the business had lost as much as $750,000. R. 455.

Pursuant to South Carolina procedure, which Cincinnati does not challenge, the jury was allowed to consider Osco's contract action, as well as its two tort actions. The jury returned a verdict for Osco in the amount of $800,000 on its negligence claim, $250,000 on its bad faith claim, and $254,029.23 on the breach of contract claim. The trial judge asked Osco to elect between its negligence and contract claims, and Osco elected negligence. R. 937-38, 945-46. The trial judge found the verdict on the negligence theory of liability to be excessive, albeit not the result of caprice, passion, or prejudice, and ordered a reduction of the actual damages to $595,216. R. 204. That reduction was accepted by Osco.

In the second phase of the bifurcated proceeding, the court then allowed both sides the opportunity to present evidence on the issue of punitive damages. Osco presented an economist who analyzed for the jury Cincinnati's financial statements on file with the South Carolina Department of Insurance. This economist answered just thirteen questions from Osco's counsel and one from Cincinnati's counsel. Cincinnati offered no evidence on the issue of punitive damages. The jury awarded $1,630,000 in punitive damages, roughly twice the actual damages they had awarded, in a sum which amounted to .003 percent of Cincinnati's net worth. R. 13.

The punitive damage award was scrutinized by the trial court in light of South Carolina's requirement for post-trial review pursuant to *Gamble v. Stevenson,* 305 S.C. 104, 406 S.E.2d 350 (1991). R. 980-985. The South Carolina Court of Appeals, South Carolina's intermediate

appellate court, then reviewed the trial judge's findings and affirmed the judgment for actual and punitive damages.

SUMMARY OF ARGUMENT

Petitioner's attempt to cast its argument in constitutional terms is belated, as the due process claims asserted in the Petition were not raised or preserved, if at all, with any degree of specificity in the trial or appellate courts of South Carolina. Only one of the eight issues asserted in the Petition was raised in the trial court, i.e., that the procedure dictated by the Supreme Court of South Carolina in *Gamble* does not satisfy the requirements imposed by this Court in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991). Cincinnati first articulated that due process claim only after trial, not before or during trial. Cincinnati failed to preserve that issue in the trial and appellate courts of South Carolina. Even if the issue had been preserved, Cincinnati's contention that South Carolina lacks adequate procedures

for post-trial review of punitive damages is without merit because the South Carolina trial court's scrutiny mirrors the Alabama Supreme Court procedure approved by this Court in *Haslip*.

The issues presented in the Petition are a veiled attack upon the substantive law of South Carolina and the sufficiency of evidence to support the verdict. Osco respectfully submits that the South Carolina Court of Appeals correctly decided these issues, but even if it erred, the Petition raises no significant issue of federal constitutional law which warrants this Court's review. Rather, the Petition is one last attempt by Cincinnati to justify its callous disregard of the rights of its insured. In furtherance of its pattern of denying responsibility for its negligence and bad faith towards Osco, Cincinnati has ignored the substantial evidence in the record which supports the jury's award of actual and punitive damages.

This Court should deny Cincinnati's Petition for review of these state tort and evidentiary issues.

REASONS FOR DENYING PETITION

I. Cincinnati waived its due process challenges to the jury's actual and punitive damage awards because it failed to present the issues to the courts of South Carolina in a timely and proper manner.

Petitioner's federal questions were not timely and properly raised in the courts below. The citations to the Record on page 29 of the Petition do not specify as required by Rule 14.1(h) the information necessary to demonstrate that the federal questions presented in the Petition were raised, passed upon and preserved. To the contrary, the pages cited by petitioner in its statement of the case indicate that Cincinnati asserted a denial of due process only in the most general of terms. For example, R. 975-976 contains a reference to the "14th and 16th Amendments" to the Constitution but no reference to due process, much less any specificity that would have apprised

the trial court of the nature of Cincinnati's due process claim.

Of 50 grounds advanced by Cincinnati in its Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, only one, number 12, mentions due process. That ground states, "An award of punitive damages under South Carolina law is violative of the Defendant Cincinnati's due process rights as provided by the United States and South Carolina Constitutions." R. 63. In its argument under that heading in the memorandum which accompanied that motion, Cincinnati addressed only an allegation that the Supreme Court of South Carolina in *Gamble* had failed to adopt any meaningful appellate court review of punitive damages. R. 87-91. When the trial court failed to address this issue in its order on post-trial motions, Cincinnati failed to raise this issue in its motion for reconsideration under South Carolina Rules of Civil Procedure 59(e). R. 158-161. Under South Carolina

procedural law, a 59(e) motion is required to preserve for appeal any issue not addressed by the trial court. *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 412, 426 S.E.2d 828, 831 (Ct. App. 1993). Accordingly, this issue was waived in the trial court.

On appeal to the Supreme Court of South Carolina, in its statement of issues on appeal, Cincinnati again addressed due process under the federal constitution in only one of its grounds for reversal. Again, that argument was directed solely at whether South Carolina had complied with this Court's ruling in *Haslip*, 499 U.S. 1 (1991), with regard to post-trial review of punitive damages awards. That attempt to resurrect the constitutional question, i.e., whether such review must be conducted by an appellate court, was waived in oral argument by Cincinnati's counsel before the South Carolina Court of Appeals. In response to questioning by the court about whether the issue had been raised at trial, Cincinnati's counsel conceded that the

essence of Cincinnati's argument was its contention that the record contained no evidence to support the punitive damage award, rather than the lack of a sufficient appellate review procedure.

> Judge Goolsby: Mr. Sweeny, on Page 27 of your brief --
>
> * * *
>
> -- it raised an issue regarding the constitutionality of the review procedure by an appellate court, do you not?
>
> Mr. Sweeny: Yes, sir, I do.
>
> Judge Goolsby: Was that argument raised and ruled on by the trial judge?
>
> * * *
>
> Do you represent to us that this argument that you have on Page 27 and the following pages of your brief concerning appellate review was raised and ruled on?
>
> Mr. Sweeny: No, I do not.
>
> * * *
>
> Judge Goolsby: Do you understand my question, Mr. Sweeny?
>
> Mr. Sweeny: I'm not sure.

Judge Goolsby: You questioned the review procedure, as I read Question Number 3 on Page 27 of your brief. You questioned the constitutionality, the constitutional validity of appellate review. Do you not do that?

Mr. Sweeny: Yes, sir, I do.

Judge Goolsby: Did you raise that to the trial judge as a basis for your motion for a new trial and your motion for J.N.O.V.?

* * *

Mr. Sweeny: I raised that in my motion for a new trial, I believe.

Judge Goolsby: All right sir. Did he rule on it?

* * *

This very argument. See, you make a distinction in your brief about the Alabama Supreme Court having a different review than we have here in South Carolina, --

* * *

-- and in the *Gamble* case, there was no discussion of appellate review.

Mr. Sweeny: That's correct.

Judge Goolsby: And you seek to have these punitive damages thrown out on the basis that there's not any appellate review that has been constitutionally approved as in the *Haslip* case.

> Mr. Sweeny: Right. To be quite candid to you, the *Haslip* case has changed since I wrote this brief; and this is not the gist and has not been the focus of our attitude towards this case. We believe that there's no evidence of recklessness to begin with so that there's no showing upon which punitive damages could be awarded.
>
> * * *
>
> Judge Goolsby: Well, it just raises another issue; and that is the jurisdiction of the South Carolina Court of Appeals to address something on -- of a constitutional matter.
>
> Mr. Sweeny: Right. I see that now. But quite candidly, the focus of our appeal here is -- we just think that what took place in the lower court is just totally wrong in regard to the verdicts, both on the actual --
>
> Judge Goolsby: Well, that's a different issue than a constitutional one.
>
> Mr. Sweeny: I understand.

Tape, oral argument, South Carolina Court of Appeals, October 4, 1993.

Cincinnati raised in the trial court no due process challenge on any of the other grounds it now cites in its Petition for a Writ of Certiorari. Therefore, those issues were not preserved either.

II. Cincinnati's contention that post-trial review of a punitive damage award is meaningful only if conducted by an appellate court rather than a trial court does not present a due process issue.

Cincinnati contends that the procedure approved by the Supreme Court of South Carolina in *Gamble* fails to impose "a sufficiently definite and meaningful constraint on the discretion of [South Carolina] factfinders" as required by this Court in *Haslip*, 499 U.S. at 22, because the review is conducted by the trial court rather than an appellate court. Even if it had been preserved, this issue does not warrant review.

Cincinnati does not challenge the sufficiency of the trial court's post-trial review of the punitive damage award, but only the judicial level at which the review was conducted. Cincinnati maintains that regardless of the degree of scrutiny conducted by the trial court, its due process rights have been violated because under the standard of review employed by the Supreme Court of

South Carolina, a punitive damage award will not be overturned absent an abuse of discretion by the trial court, *Gamble*, 305 S.C. at 112, 406 S.E.2d at 355, and therefore no "meaningful" appellate review exists.

Cincinnati has articulated no reason why a trial court in South Carolina following the *Gamble* procedure does not provide the constitutionally required restraint on the jury's discretion as does the Alabama Supreme Court's procedure approved in *Haslip*.[2] Nor has Cincinnati asserted that the trial court's scrutiny failed to comply with the requirements of *Gamble*. Osco submits that the trial court's post-trial inquiry pursuant to *Gamble* met the requirements of due

---

[2] Cincinnati fails to cite *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (CA4 1991), a diversity case arising under South Carolina law in which the Fourth Circuit Court of Appeals reviewed the procedure outlined in *Gamble*. The Fourth Circuit determined that the post-trial review procedure mandated by *Gamble* satisfies the requirements of due process because the procedures mandated by the Supreme Court of South Carolina to be performed "by trial courts in South Carolina will parrot the review conducted by the Alabama Supreme Court as described in *Haslip*." 947 F.2d at 109.

process as articulated by this Court in *Haslip*. The South Carolina Court of Appeals reviewed the record, found no abuse of discretion, and correctly affirmed the jury's award. Cincinnati has not been denied due process by this procedure.

III. Petitioner's due process challenges to the actual and punitive damage awards collapse under a proper construction of the theory of liability submitted to the jury.

Cincinnati argues that its due process rights were violated by the imposition of punitive damages based upon a cause of action not elected by Osco. The South Carolina Court of Appeals found that Cincinnati failed to preserve this issue for appeal because Cincinnati failed to take exception to the Court's charge on this point. App. 35-36. But, even if preserved, Cincinnati's disagreement with the South Carolina Court of Appeals about the nature of the plaintiff's tort claim and what evidence is relevant to it for

punitive damages purposes does not give rise to any federal constitutional question.

Osco filed this lawsuit alleging theories of breach of contract, negligence, bad faith, and in the alternative, reformation of the contract. Cincinnati has repeatedly argued that the trial court required an election of remedies between the bad faith and negligence causes of action. Petition at 23, 35, 40. That assertion is erroneous. Prior to the jury verdict, the only election requested by Cincinnati was an election between the equitable claim (reformation of contract) to be tried by the court and the legal claims to be tried by the jury. R. 241-245.

The "election" after the jury's verdict on actual damages was not an election in the sense of the previous motions, at all. South Carolina law and procedure, which petitioner does not challenge, allows the trial court, in a bad faith action, to present both tort and contract actions to the jury. App. 27-28. The plaintiff, however, must

choose a theory on which to collect damages to avoid "double dipping." The court asked Osco to elect between negligence and contract, and Osco chose to collect on the negligence cause of action. R. 937-938, 945-946. However, that "election" did not obviate the jury's verdict on the other theories of liability. The jury had found Cincinnati guilty of bad faith and negligence and found wilfulness, recklessness or wantonness with respect to both. R. 36-37. After this "election," the court made it clear that both the negligence and the bad faith claims were still in the case and that the jury could consider both tort claims on the punitive damage issue. R. 956-959.

Cincinnati disagrees with the conclusions of the trial court and the South Carolina Court of Appeals. To support its position, Cincinnati quotes the complaint in its Petition. However, the pleadings did not go to the jury. R. 880. What went to the jury was the evidence presented and the law applicable thereto as contained in the charge.

Cincinnati repeatedly refers to a "stipulation" about the nature of the negligence claim. No stipulation occurred, however. Cincinnati has taken out of context a few lines in a long colloquy between counsel and the court. The colloquy resulted in a charge to the jury on a negligence claim against Cincinnati that was not solely derivative of Bryant's negligence. The particulars under the negligence action, as submitted to the jury, were: "[B]y writing an incorrect address into the insurance policy, by changing the insurance policy without notice to Osco, and by producing an insurance policy which failed to meet Osco's stated request for coverage while leading Osco to believe that those needs were covered." R. 889. Neither the court nor counsel believed that an election was being made to ignore the misconduct of the insurance company under the bad faith theory.

Cincinnati's argument that its due process rights were violated because the award of punitive damages is based

solely upon its vicarious liability for acts of its agent is wrong legally and factually. In *Haslip*, this Court approved an award of punitive damages on the vicarious liability theory of *respondeat superior*. 499 U.S. at 15. Moreover, Cincinnati's argument proceeds from the erroneous premise that the record contains no evidence of Cincinnati's independent negligence. The trial court and the South Carolina Court of Appeals addressed this issue and found sufficient independent evidence of Cincinnati's recklessness and wilfulness to justify the award of punitive damages. App. 21-23, 56-57.

Osco proved that Cincinnati negligently produced a policy with a patently erroneous address and then used the result of its negligence (the policy with the wrong address) as a basis for refusing to pay Osco's claim, denying for months even payment on the undisputed portion of the claim. The jury found that Cincinnati acted not only negligently, but also recklessly, wilfully, wantonly, or in

conscious disregard of Osco's rights. R. 36. The South Carolina Court of Appeals concluded that "[j]ust as Cincinnati's handling of the claim was relevant to Osco's actual damages under its negligent procurement claim, it was also relevant to the award of punitive damages . . . ." App. 38 (footnote omitted). Osco submits this conclusion is correct.

IV. No federal constitutional issue is presented by Cincinnati's complaints about South Carolina procedural and evidentiary law or in Cincinnati's challenge to sufficiency of the evidence to support the verdict.

Cincinnati's claim that the admissibility of certain evidence in the punitive damages phase violates due process is meritless. The trial court and the South Carolina Court of Appeals found that Cincinnati had waived all but one of its objections to the punitive damages evidence, i.e., the allegedly improper "formula." App. 26, 59. The South Carolina Court of Appeals went on to hold that the "formula" evidence was not improper because Cincinnati's

daily earnings are clearly relevant to its ability to pay. App. 26-27. Further, no prejudice appears from the admission of such evidence, as the award was far less than Cincinnati's daily earnings and insignificant compared to its net worth. App. 23.

Cincinnati's claim that the record contains no evidence of recklessness or wilfulness in regard to Cincinnati's negligence simply represents a disagreement with the trial court and the South Carolina Court of Appeals about the nature of the wrong done to Osco and the kinds of evidence probative of whether the wrong was committed wilfully or recklessly. This contention involves purely matters of state tort and evidence law which have been reviewed and decided adverse to Cincinnati's position.

The South Carolina Court of Appeals found evidence in the record sufficient to support the jury's finding that Cincinnati was negligent and then engaged in a series of acts to obfuscate, confuse and mislead the insured from

discovering Cincinnati's negligence. Its decision recites a number of wilful, callous and intentional acts of Cincinnati sufficient to support the award of punitive damages. App. 9-11, 21-23. The South Carolina Court of Appeals held that Cincinnati's handling of the claim was relevant to the issue of punitive damages on Osco's negligence claim. App. 38. Cincinnati's disagreement with the South Carolina Court of Appeals on this point fails to raise any federal constitutional issue. Whether the South Carolina Court of Appeals made a mistake in applying South Carolina law or South Carolina rules of evidence is not a federal question.

Cincinnati's contention that the actual damages verdict indicates such a degree of passion, prejudice, caprice or bias that Cincinnati has been denied due process rights is similarly without merit. The South Carolina Court of Appeals held the verdicts on the three theories of liability submitted to the jury to be consistent rather than

inconsistent under South Carolina law. App. 27-28. Further, the trial court and the South Carolina Court of Appeals identified testimony in the record to support the jury's $800,000 award on the negligence claim. App. 29, 53. Even if the South Carolina Court of Appeals were wrong in these conclusions, the issue is not one of federal constitutional significance.

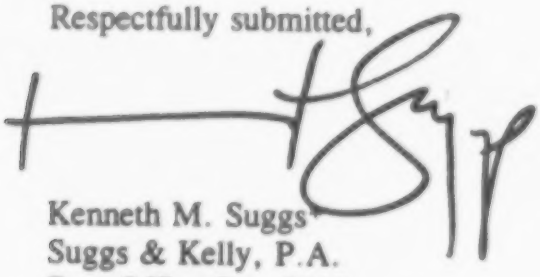
The only other basis for Cincinnati's challenge to the actual damage award is plaintiff's counsel's allegedly inflammatory jury argument. This argument was not made at trial and therefore has been waived. App. 31, 54, 69.

This is nothing more than an ordinary tort case. The punitive damages awarded to Osco as a result of Cincinnati's conduct was only twice the actual damages award and was only about .003 percent of the defendant's net worth. Cincinnati's complaints about the handling of the trial do not warrant review by this Court.

CONCLUSION

Cincinnati's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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